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Nos. 84-325 and 84-356

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

METROPOLITAN LIFE INSURANCE COMPANY,
Appellant
v.
COMMONWEALTH OF MASSACHUSETTS,
Appellee

THE TRAVELERS INSURANCE COMPANY,
Appellant
v.
COMMONWEALTH OF MASSACHUSETTS,
Appellee

On Appeal From The Supreme Judicial Court Of The Commonwealth Of Massachusetts

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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The American Federation of Labor and Congress of Industrial Organization ("AFL-CIO") submits this brief *amicus curiae* with the consent of the parties pursuant to the rules of this Court.

INTEREST OF THE AMICUS CURIAE

The AFL-CIO is a federation of 95 national and international labor organizations representing approximately 13,000,000 employees throughout the United States. These unions engage in collective bargaining in an effort to secure for the employees they represent the terms and conditions of employment those employees desire.

It is the experience of the AFL-CIO and of its affiliates that state laws of the type at issue here make that task more, rather than less, difficult by substituting for private decision-making a state-imposed requirement that, if certain benefits are agreed to (here, insurance for hospital and surgical expenses), other benefits must also be provided (here, insurance for treatment of mental illness) regardless of whether the employees desire such benefits or would prefer other benefits (or higher wages) instead. The AFL-CIO submits this brief *amicus curiae* to demonstrate that Congress intended to protect the autonomy of private decision-making with respect to these matters.

SUMMARY OF ARGUMENT

Section 514 of ERISA, 29 U.S.C. § 1144, states the general ERISA preemption rule: the Act "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan. . ." Standing alone, that section would undoubtedly preempt the portion of the Massachusetts law at issue here for, as the Massachusetts court recognized, the state law "effectively control[s] the content of insured welfare benefit plans" and thus "relate[s] to" such plans. J.S. 20a. And the preemptive force of § 514(a) is enhanced by the federal labor laws which embody an "additional federal interest in precluding state interference with labor-management negotiations." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981). Part A, pp. 4-6 *infra.*

The court below relied on the ERISA "savings clause" —which provides that "nothing in this subchapter shall

be construed to exempt or relieve any person from any law of any State which regulates insurance. . . ," ERISA § 514(b)(2)(A), 29 U.S.C. § 1444(b)(2)(A)—to sustain the Massachusetts law. The court read the key words in that clause—"law . . . which regulates insurance"—to save any statute which, in form, is addressed to insurers and which does not "conflict with the policies or operation of ERISA." J.S. 5a. And the court concluded that the Massachusetts law at issue here is not in conflict with ERISA—and thus is not preempted—because it "affects only the substantive contents of plans." *Id.* 22a.

On its face, the decision below is an implausible construction of the savings clause. Nothing in the language of that clause bespeaks a congressional intent to set the courts at large to determine, on an *ad hoc* basis, which state laws conflict with ERISA's policies. Furthermore, the effect of the decision below is to transform ERISA—which was enacted to "assur[e] the . . . financial soundness" of benefit plans, ERISA § 2(a), 29 U.S.C. § 1001(a) —into a law which places insured plans at a disadvantage as compared to self-insured plans and thereby discourages the use of insurance to fund benefit plans. Part B, pp. 6-10, *infra.*

That is not what Congress intended. The legislative history, which we review in detail, Part C(1), pp. 10-23, *infra*, proves that Congress sought to protect the autonomy of private decisions with respect to the content of benefit plans, and that to the extent regulation was desirable, Congress concluded that uniform regulation was required to accommodate the needs of multi-state plans. Congress also sought to encourage the use of insurance to fund benefit plans. The savings clause—which Congress viewed as a narrow exception to the broad preemption rule of § 514(a)—was not intended effectively to nullify those policies by authorizing state regulation of the contents of insured plans through the form of insurance reglation. Rather, to make sense of the statutory language and policies, the phrase "law . . . which regulates insurance" must be understood to mean a law that both in

form *and in substance* is addressed to the conduct of insurers, and not to the content of benefit plans. Accordingly, the Massachusetts law at issue here falls outside the savings clause and thus is preempted by § 514(a). Part C(2)-(3), pp. 23-27, *infra*.

ARGUMENT

The Massachusetts statute at issue in this case states that "[a]ny blanket or general policy of insurance . . . which provides hospital expense and surgical expense insurance . . . or any employees' health and welfare fund which provides hospital expense and surgical expense benefits . . . shall provide benefits for expense . . . arising from mental or nervous conditions . . ." Mass. Gen. Laws ch. 175, § 47B. It is common ground that, under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C .§ 1001 et seq., a state may not in terms require an employee benefit plan to provide any particular benefits and that therefore insofar as the Massachusetts law applies directly to such plans, the statute is preempted by ERISA. But the Massachusetts Supreme Judicial Court held that under ERISA a state may "effectively control the content of insured welfare benefit plans," J.S. 20a, so long as the state does so "indirectly through its insurance laws," *id.* 6a.

As we proceed to show, that holding is erroneous: ERISA—both standing alone and when read in conjunction with the federal labor laws—precludes the states from controlling the nature and quantum of benefits provided by an employee benefit plans regardless of the form of the state regulation.

A. Section 514 of ERISA, 29 U.S.C. § 1144, is a "virtually unique preemption provision." *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, —— U.S. ——, 51 L.W. 4945, 4952 n.26 (June 24, 1983). Subsection (a) of that section states the general ERISA preemption rule: the Act "shall supersede any and all state laws insofar as they may now or hereafter relate to

any employee benefit plan. . ." "The breadth of § 514(a)'s pre-emptive reach is apparent from that section's language. A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw* v. *Delta Air Lines, Inc.*, —— U.S. ——, 51 L.W. 4968, 4971 (June 24, 1983).

If § 514(a) stood alone, there would be no doubt that the portion of the Massachusetts law at issue here would be preempted. As the Massachusetts court observed, under the state statute "a plan that purchases insurance has no choice but to provide mental health care benefits" and thus the law "effectively control[s] the content of insured welfare benefit plans." J.S. 20a. Based on that fact, and based upon its reading of *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981)—in which this Court held that § 514(a) preempts a state statute prohibiting set-offs of workers compensation payments against pension benefits—the Massachusetts court concluded that the Massachusetts statute "is a law that 'relate[s] to' benefit plans within ERISA's general preemption clause." J.S. 20a.

Alessi also points to "[a]nother consideration [which] bolsters [this] conclusion." 451 U.S. at 525. As the Court there noted, under the National Labor Relations Act, as amended, there is an "additional federal interest in precluding state interference with labor-management negotiations," *id.*; reading that Act in conjunction with ERISA the *Alessi* Court concluded that it is "federal policy" to assure that employee benefits are "a subject of either labor-management negotiations or federal legislation," *id.* at 526 n.22. The Massachusetts statute at issue here is squarely contrary to that policy.[1]

[1] It is not at all clear how far the federal policy favoring free collective bargaining, standing alone, would go in preempting state regulation of benefit plans. The NLRA is silent with respect to the issue of preemption, and "the statutory implications of what

B. The Massachusetts court nonetheless sustained the state statute, relying on subsection (b)(2)(A) of ERISA § 514—the "savings clause," 29 U.S.C. § 1144(b)(2)(A). That clause provides, in pertinent part, that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance . . ." The court below held—erroneously as we now show—that insofar as it applies to insured benefit plans the Massachusetts statute is a "law . . . which regulates insurance" within the meaning of that clause.

As the Massachusetts court recognized, the bare words of the savings clause are "of little help" in ascertaining its sweep. J.S. at 22a. That clause could, of course, be read to save from preemption all state statutes which, *in form*, are addressed to an insurance company, regardless of the substance of the statute or its impact on benefit plans. But such a reading would mean that, with re-

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has been taken from the States and what has been left to them are of a Delphic nature . . ." *Machinists* v. *Gonzales*, 356 U.S. 617, 619 (1958). This Court recognized years ago that "[s]tate laws have long regulated a great variety of conditions in . . . industry," and "it cannot be that the minimum requirements laid down by state authority are all set aside" by federal law. *Terminal Ass'n* v. *Trainmen*, 318 U.S. 1, 6-7 (1943). On the other hand, it is equally clear that the states cannot be wholly free to "limit[] the solution that the parties' agreement can provide to the problem of wages and working conditions." *Teamsters Union* v. *Oliver*, 358 U.S. 283, 295-96 (1959). *See also* Brief of the AFL-CIO as *Amicus Curiae* in No. 83-1748, *Allis Chalmers Corporation* v. *Lueck* at pp. 3-6 & n.3.

It is not necessary in this case for the Court to decide where the NLRA, standing alone, would require that the line be drawn between what "has been taken from the States and what has been left to them." *Malone* v. *White Motor Corp.*, 435 U.S. 497, 505 (1978), teaches that, prior to ERISA, the Welfare and Pension Plans Disclosure Act ("WPPDA"), 72 Stat. 997, provided "a far more reliable indicium of congressional intent with respect to state authority to regulate pension plans" than did the NLRA. And the same is now true with respect to ERISA, the successor to the WPPDA. *See also Alessi*, *supra*, 451 U.S. at 526 n.23. At most, then, as in *Alessi*, the NLRA here "bolsters" the conclusion derived from ERISA § 514(a).

spect to insured plans, the states would be free to regulate the very subjects regulated by ERISA, and to do so in a manner inconsistent with ERISA. For example, under that reading of the savings clause a state could, through ostensible insurance regulation, mandate that pensions in insured plans fully vest after an employee completes only five years of service, even though Congress, in enacting ERISA, opted for a ten-year vesting requirement. *See* ERISA § 203(a). Such a broad reading of the savings clause thus would "permit the State, through its insurance laws, to reach far into areas governed by ERISA, and thereby negate the unmistakable intent of Congress to work a broad preemption," as the Massachusetts court conceded. J.S. at 21a.

The court below therefore eschewed such a reading of the savings clause, concluding, instead, that to be saved by that clause a state law must not only satisfy certain formal requirements (*i.e.* be addressed, in terms, to insurers) but also must "not conflict with the policies or operation of ERISA." J.S. at 5a; *see also id.* at 22a. That court determined that there is no conflict between the Massachusetts law at issue here and ERISA because the state law "affects *only* the substantive content of plans," a subject which, according to the state court, is "completely untouched by ERISA's regulatory provisions." *Id.* at 22a (emphasis added); *see also id.* at 5a n.4.

In reaching this conclusion the Massachusetts court rejected the proposition that by mandating insured-plan benefits the Massachusetts laws interfered with a congressional decision "to designate an area of private self-determination with respect to choice of benefits," as that court found no "persuasive evidence in the legislative history of an affirmative policy to curtail State police power in favor of private decision-making." *Id.* at 23a. And the court below likewise rejected the contention that state mandated-benefits conflict with a policy of allowing "interstate employers to maintain uniform plans," *id.*

at 5a-6a, concluding that to attribute such an intent to Congress would be "inconsistent . . . with the broad language of the insurance exemption," *id.* at 6a, which exemption, in that court's view, proved that Congress "could not have intended to mandate complete uniformity for the convenience of multi-state employers," *id.* at 24a.

As we proceed to show, the Massachusetts court has misunderstood Congress' intent. The legislative history of ERISA demonstrates that Congress emphatically protected private decision-making with respect to the content of benefit plans and that to the extent regulation was desirable, Congress concluded that uniform federal regulation was required to accommodate the needs of multistate plans. Given that intent, the phrase "law . . . which regulates insurance" as used in the savings clause cannot be understood to mean a law which only in form is addressed to insurers. Rather, to satisfy this definition, a statute also must, *in substance*, concern the decisions of insurers, and not decisions of benefit-plan administrators or sponsors on such fundamental matters as what benefits to provide. In other words, a "law . . . which regulates insurance" is one as to which the burden of compliance falls directly on insurers rather than on benefit plans. A law mandating that particular benefits be provided by insured plans thus is not a "law . . . which regulates insurance" under the savings clause.[2]

[2] In contrast, and by way of illustration, a law that required insurers to offer certain *options* in health insurance—for example, a mental health option—is a law regulating insurance (as are the more familiar forms of insurance regulation such as reserve requirements, reporting requirements for insurers, and the like). Such laws do not attempt to regulate the contents of benefit plans. A number of states have enacted laws mandating insurance options, at least with respect to treatment for alcoholism and drug dependency. *See* National Association of State Alcohol and Drug Abuse Directors, *Private Health Insurance Coverage for Alcoholism and Drug Dependency Treatment Services: State Legislation that Mandates Benefits or the Offering of Benefits for Purchase* at 5-6 (July, 1983).

Before turning to the legislative history we pause briefly to make two observations about the decision below —observations which highlight the implausibility of that decision.

First, it is important to note that the Massachusetts court failed to propose any definition of the critical statutory phrase "law . . . which regulates insurance" in the savings clause. Instead that court adopted what it termed a "conflict-based analysis" under which the determination of whether a particular law is within or outside the savings clause depends on a judicial decision, on a case-by-case basis, as to whether the law "conflict[s] with the policies or operation of ERISA." J.S. 5a. But nothing Congress said bespeaks an intent to set the courts at large to undertake such an *ad hoc* "conflict-based analysis."[3]

Second, under the decision below, states may mandate benefits for insured plans, but *not* for self-insured plans.[4] Consequently, insured plans will be put at a disadvantage as compared to self-insured plans; in Massachusetts, for example, an employer and union could agree to a health program that did not include mental health

[3] It is also noteworthy that in *Shaw, supra,* the Court squarely rejected the proposition that ERISA preempts only state laws that are inconsistent with it. *See* 51 L.W. at 4971, 4973 & n.25. The Massachusetts court questioned that aspect of *Shaw*'s holding. *See* J.S. 6a.

[4] With respect to self-insured plans, the "deemer clause," ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B), precludes any possible attempt by a state to use its insurance law to circumvent § 514(a)'s preemptive force. The deemer clause provides in pertinent part:

> Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance for purposes of any law of any State purporting to regulate insurance companies, insurance contracts. . .

coverage only by creating a self-insured plan. And were other states to mandate other benefits that those states deem desirable, that "would make administration of a uniform nationwide plan more difficult," *Shaw v. Delta Air Lines*, *supra*, 51 L.W. at 4973 n.25, presenting multi-state plans with the "Hobson's choice" of "either abandon[ing] the funding of benefit plans through insurance policies or . . . accept[ing] all-encompassing uniform national contracts" that provide every benefit required by any state.[5]

It is most unlikely, to say the least, that a statute which was enacted for the very purpose of "assuring the equitable character . . . and . . . financial soundness" of benefit plans, ERISA § 2(a), 29 U.S.C. § 1001(a)—based upon Congress' finding that "the soundness and stability of plans . . . may be endangered," *id*—was meant to *discourage* the use of insurance as a method of funding benefit plans and to encourage self-insurance instead. *See also* pp. 24-25, *infra*. Yet that is the necessary consequence of the decision below. Not surprisingly, the legislative history demonstrates that Congress intended no such anomaly.

C. 1. The legislative history of ERISA begins in the Ninetieth Congress. During that Congress the Johnson administration submitted two bills (S. 1024 and S. 3421), which together would have established comprehensive federal regulation of employee benefit plans; those bills were introduced by Senator Yarborough as chairman of the Senate Committee on Labor and Public Welfare. During the same Congress, Senator Javits, the ranking minority

[5] Hutchinson & Ifshin, *Federal Preemption of State Law Under the Employment Retirement Income Security Act of 1974*, 46 U. Chi. L. Rev. 23, 68 (1978).

member of that committee, submitted his own bill (S. 1103) to regulate employee benefit plans.[6]

For present purposes what is most significant about the Yarborough and Javits bills is that both expressly disclaimed any preemptive effect. Section 18(a) of S. 1024, one of the Yarborough bills, provided:

> The provisions of this Act . . . shall not be held to except or relieve any person from compliance with any Federal or State law imposing affirmative obligations, duties, responsibilities or other standards of conduct with respect to the operation or administration of employee welfare or pension benefit plans.[7]

And § 508 of the Javits bill provided:

> Nothing in this Act shall be deemed to nullify any provision of any State or Federal law not in direct conflict with a provision of this Act.

The Senate committee held hearings in 1968 on the various pension bills that had been introduced, *see* Senate Committee on Labor and Public Welfare, Subcommittee on Labor, *Hearings on Pension and Welfare Plans*, 90th Cong., 2d Sess. (1968), but no legislation was reported by the committee.

[6] As Senator Javits observed, both "the administration bill as well as my own are heavily based upon the Cabinet Committee's report on private pension plans." Senate Committee on Labor and Public Welfare, Subcommittee on Labor, *Hearings on Pension and Welfare Plans*, 90th Cong. 2d Sess. 165 (1968). The Cabinet Committee, which had been appointed by President Kennedy in 1962, submitted a report in 1965 calling for remedial legislation in a number of areas. *See* S.Rep. 93-127, 93rd Cong., 1st Sess. 7 (1973) (discussing report).

[7] S.1024, the bill of which the quoted section was a part, addressed only reporting, disclosure and fiduciary requirements; the Johnson administration proposed a separate bill, S.3421, to establish minimum vesting and funding requirements and to create federal pension insurance. That latter bill had no preemption provision at all.

Work on federal pension legislation continued in the Ninety-First Congress. The various bills from the prior session were all reintroduced. *See* S.2167 (Javits bill); S.4326, 4327 (Johnson administration bills). In addition, the new Secretary of Labor, George Shultz, prepared a new piece of legislation, S.3859, supported by the Nixon administration, which was introduced for the administration by Senator Javits, *see* 116 Cong. Rec. 7278. That bill was more limited in scope than the original Javits' bill in that the Nixon administration bill did not have any minimum vesting or funding provisions but rather established only reporting and disclosure requirements and fiduciary standards. But for present purposes, the Nixon administration bill is significant because, unlike its predecessors, that bill would have had the effect of preempting state law with respect to the subjects the bill regulated. Specifically, § 18 of that bill provided:

> It is hereby declared to be the express intent of Congress that . . . the provisions of this Act shall supersede any and all laws of the States and of political subdivisions thereto insofar as they may now or hereafter relate to the fiduciary, reporting and disclosure responsibilities of persons acting on behalf of employee benefit plans.

Furthermore, the Nixon administration bill contained a "savings clause" which was identical to the one eventually enacted in ERISA: "nothing herein shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities." S.3589, § 18, 91st Cong., 2d Sess.

In introducing the Nixon administration bill, Senator Javits placed into the Congressional Record an explanatory statement and section-by-section analysis which said in pertinent part:

> The Act provides for a uniform source of law for evaluating the fiduciary conduct of persons acting on behalf of employee benefit plans and a singular re-

> porting and disclosure system in lieu of the burdensome multiple reports.
>
> * * *
>
> Section 18 designates the Act as the exclusive form of regulation for employee benefit plans within the areas covered, but provides that State laws which otherwise regulate insurance, banking and securities shall remain operative. [116 Cong. Rec. 7286, 7288]

Thus, at its creation, the combined force of an express preemption provision and the savings clause was stated to be to provide "exclusive [federal] regulation for employee benefit plans within the areas covered" by federal law and to preserve state laws that "*otherwise* regulate insurance."

No hearings were held in the Senate during the Ninety-First Congress with respect to the various pension bills, but hearings were held by Representative Dent's General Subcommittee on Labor of the House Labor and Education Committee. *See* House Committee on Education and Labor, General Subcommittee on Labor, *Hearings on Private Welfare and Pension Plan Legislation*, 91st Cong., 1st and 2d Sess. (1970). At those hearings, Secretary of Labor Shultz testified in support of the Nixon administration bill (which had been introduced in the House, without any explanation, by Rep. Ayres, as H.R. 16462, *see* 116 Cong. Rec. 7453). In his testimony Secretary Shultz laid down certain principles for developing federal regulation of benefit plans—principles that continued to be followed over the years during which ERISA was formulated, and are of relevance in understanding the preemption provision of ERISA:

> A balance of concerns exist that must be weighed in judging the private pension system. I am concerned about the worker whose expectations of receiving a pension after long years of service are disappointed because of the absence of a suitable vesting provision; about the workers who lose their accrued

pension rights for lack of sufficient funds in a plan when it is prematurely terminated; about the adequacy of the level of benefits for our retired workers, and about the restrictions on individual choice of benefit level built into our present system.

* * *

I am also concerned lest the Government intrude itself unduly into free collective bargaining about pensions; and I am concerned that private pension plans not lose their flexibility and their adaptability to meet needs in widely different circumstances, and about impairing the competitive position of the employers who provide pension coverage for their employees as against those who do not.

* * *

The need for uniform standards to guarantee benefit security also must be balanced against the possible loss of some freedom and flexibility in plan design and operation, which are valuable characteristics of the private system. [*Hearings on Private Welfare and Pension Plan Legislation, supra*, at 473-74 (emphasis added)]

Secretary Shultz went on to discuss the Nixon administration bill, explaining the rationale for its preemption provision as follows:

> Administrators of plans covering employees in several or more States will not have the burden of complying with several sets of State laws, rules, and regulations. They will be able to formulate procedures and conduct themselves with reference to one uniform law.
>
> Participants and beneficiaries will be able to judge fiduciary conduct according to a uniform standard. [*Id.* at 481]

Although the Nixon administration bill (along with all other pension bills) died in committee in the Ninety-First Congress—and although eventually a law was enacted far broader than that proposal—the bill nonethe-

less marked a turning point insofar as the preemption issue was concerned. From that time forward, every major bill that was introduced into Congress contained a preemption provision at least as broad as the one proposed by the Nixon administration, and each contained that administration's savings clause. This is true both of the bills introduced in the Ninety-Second Congress,[8] and also of the bills introduced in the Ninety-Third Congress, the one that enacted ERISA.

In the Ninety-Third Congress two bills became the focal points for the legislative effort to regulate benefit plans: S.4, introduced by Senators Williams and Javits, *see* Senate Committee on Labor and Public Welfare, *Legislative History of ERISA* at 93-190 ("*Leg. Hist.*"), and H.R. 2, introduced by Representative Dent, *see* 1 *id.* at 3-67.[9] Each contained a preemption provision that

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[8] For example, at the start of the Ninety-Second Congress, Senator Javits introduced a modified version of the comprehensive pension bill he had offered in the prior Congress; his new bill, however, included a provision which, subject to the savings clause, would have preempted all state laws with respect to "the subject matters regulated by this Act." S.2, § 507, 92nd Cong. 1st Sess. (In introducing the bill, Javits noted this as one of the "more important differences" from his prior bill. 117 Cong. Rec. 283.) Similarly, Rep. Dent—who in the prior legislative session had introduced the Johnson administration bills with their non-preemptive provision, *see* H.R. 1045, 1046, 91st Cong. 1st Sess. (1971)—introduced in the 92nd Congress a bill that was pre-emptive with respect to state regulation of reporting, disclosure and fiduciary requirements. H.R. 1269 § 115, 92nd Cong. 1st Sess. (1971).

The Dent bill was not reported out of committee; the Javits bill was superseded by S.3598, 92nd Cong., 2d Sess., a bill which Senators Williams and Javits jointly introduced as a substitute for S.4. The Williams-Javits bills was reported out of the Senate Labor Committee, *see* S. Rep. 92-1150, 92nd Cong., 2d Sess. (1972) but was not acted upon by the Senate.

[9] As introduced, S.4 was identical to S.3598 as the latter had been reported out of the Senate Labor Committee in the prior Congress. *See* n.8 *supra*.

In addition to the bills mentioned in text, the Senate Finance Committee and House Ways and Means Committee developed their

was identical to its immediate predecessor: in S.4 a provision (§ 609) preempting state laws pertaining to "the subject matters regulated by this Act," 1 *Leg. Hist.* at 186-87; and in H.R. 2 a provision (§ 114) preempting state regulation of reporting, disclosure, and fiduciary requirements, 1 *Leg. Hist.* at 50-51. Each bill also contained a savings clause identical to the one eventually enacted.

The Senate bill was reported from committee with its preemption provision intact, 1 *id.* at 582-85; in the House committee the preemption provision was broadened so as to apply to state regulation of vesting and funding as well as to state regulation of reporting, disclosure and fiduciary standards, and the bill was then reported to the House, 1 *id.* at 2345-57.[10]

The reports of the two committees reveal a common animating philosophy. Both reports declare the same general approach to federal regulation of employee benefit plans:

> The Bill . . . represents an effort to strike an appropriate balance between the interests of employers and labor organizations in maintaining flexibility in the design and operation of their pension programs, and the need of the workers for a level of protection which will adequately protect their rights and just expectations. . . . This legislation strikes an appropriate and equitable balance between . . . those who advocate complete and stringent control of private pensions and those who oppose any form of supervisory or regulatory control. [S. Rep. 93-127, 93rd Cong. 1st Sess. 13-14 (1973); H.R. Rep. 93-533, 93rd Cong. 1st Sess. 9 (1973)]

own bills to amend the tax laws as they pertained to benefit plans. *See* 1 *Leg. Hist.* at 230-73 (S.1179 as introduced by Sen. Bentsen); 1 *id.* 780-1063 (S.1179 as reported); 2 *id.* 2393-2584 (H.R. 12481 as submitted and reported). The tax bills did not present any preemption issues. Eventually the tax bills and regulatory bills were incorporated into a single piece of legislation. *See also* n.12 *infra.*

[10] In the House bill, as reported, the savings clause applied only to state regulation of reporting, disclosure and fiduciary standards; there was no savings clause with respect to the provision of the bill preempting state regulation of vesting and funding. *See* 2 *Leg. Hist.* at 2345-47.

And each endorses the same approach towards preemption:

> Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for evaluating fiduciary and disclosure system in lieu of burdensome multiple reports. As indicated previously . . . the Act . . . provides that state laws regulating banking, insurance or securities remain unimpaired. [S. Rep. 93-127, *supra*, at 35; H.R. Rep. 93-533, *supra*, at 17.][11]

The Senate report is significant for one additional reason. Both the Senate and House bills, as reported, contained a provision—eventually enacted as ERISA § 506, 29 U.S.C. § 1136—authorizing the Secretary of Labor to make "agreements for cooperation or mutual assistance" with, or to "utilize . . . the facilities or services of any department, agency, or establishment of . . . any State or political subdivision of a State . . ." The House report did not comment on this provision but the Senate report did, stating:

> The states of Wisconsin and New York, for example, exercise supervision over certain pension and welfare funds in their respective jurisdictions, and the experience and technical know-how of these state agencies would be of valuable assistance to the Secretary. *It is not intended, however, that the state agencies*

[11] *See also* S. Rep. 93-127, *supra*, at 29 (stating need for uniformity with respect to fiduciary standards because "the operations of employee benefit plans are increasingly interstate"); H.R. Rep. 93-533, *supra*, at 12 (same).

utilized would formulate or apply substantive standards to plans subject to this Act which differ from the substantive standards in this Act. [S. Rep. 93-127, *supra*, at 17-18 (emphasis added)]

The Senate and House passed their respective bills without altering the preemption provisions reported by the responsible committees. *See* 2 *Leg. Hist.* 2103-05; 3 *id.* 4457-59.[12] In conference, however, the preemption provision was broadened still further, as this Court has had occasion to note, *Shaw* v. *Delta Air Lines*, *supra*, 51 L.W. at 4971 & n.18: rather than preempting only "state laws relating to the specific subjects covered by ERISA" and thereby precluding only those laws that actually conflict with ERISA, § 514(a) was amended so as to preempt state law that "relate to any employee benefit plan," *i.e.*, *all* state laws on this subject.

Significantly, the legislative history indicates—and contemporaneous observers confirm[13]—that the preemp-

[12] The Senate bill was passed, as a non-germane amendment to H.R. 4200, a minor tax bill which had been approved by the House; this was done because the bill approved by the Senate made "major changes in our tax laws" and if the Senate were "to proceed to pass S.4 under that number the House would refuse to consider the bill on the constitutional grounds that revenue bills must originate in the House of Representatives." 2 *Leg. Hist.* at 1879.

In the House, after H.R. 2 was reported, the Labor Committee worked with the Ways and Means Committee to develop, as H.R. 12906, a revised version of H.R. 2 and, as H.R. 12855, a tax-code analogue for the regulatory provisions. *See* H.R. Rep. 93-807, 93rd Cong. 2d Sess. 1 (1974) (Ways and Means Report). Those two bills were adopted as amendments to H.R. 2, and, with those amendments, H.R. 2 was approved by the House. The Senate then adopted its bill as an amendment to H.R. 2. 2 *Leg. Hist.* 3597-99.

[13] *See* Turza & Halloway, *Preemption of State Law Under the Employee Retirement Income Security Act of 1974*, 28 Cath. U. L. Rev. 163, 167 (1979) (preemption provision broadened "[i]n response to organized labor's concern over state regulation of prepaid legal service plans and both business' and organized labor's

tion provision was broadened in conference in order to protect the autonomy of benefit plans, and in particular, to guard against threatened state regulation of the substance of prepaid legal service plans. Representative Dent alluded to this concern in his remarks to the House concerning the conference preemption provision, *see* 120 Cong. Rec. 29197 (preemption provision would apply to "any rule, regulation, practice or decision of any . . . professional society or association operating under code of law"), and Senator Williams stated the point explicitly in his post-conference statement to the Senate:

> Consistent with this principle, State professional associations acting under the guise of State-enforced professional regulation, should not be able to prevent unions and employers from maintaining the types of employee benefit programs which Congress has authorized—for example, prepaid legal services programs—whether closed or open panel . . . [*Id.* at 29933]

Furthermore, during the Senate debate on the conference bill, Senator Taft engaged Senators Williams and Javits in a colloquy concerning legal service plans during which Senator Javits stated that "the State, *directly or indirectly* through the bar, is preempted from regulating the form and content of a legal service plan," 3 *Leg. Hist.* at 4789, and Senator Williams added:

> This is an area that will not give to bar associations the authority to undo what we, in Congress, have permitted to be done, that is, *giving employers and unions the freedom to develop and operate legal service plans of their choice.* [3 *Id.* at 47900]

The debate on the conference bill is significant for a further reason: it reveals that Congress intended the ERISA preemption rule to be sweeping and the exceptions narrow. For example, Representative Dent stated:

concern about the increasing state regulation of interstate plans"). The principal author of this article was a legislative aide to Senator Javits when ERISA was enacted.

I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority of the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent state regulation. . . .

The conferees, *with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans.* [120 Cong. Rec. 29197]

Similarly, Senator Williams stated:

It should be stressed that *with the narrow exceptions specified in the bill,* the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. *This principle is intended to apply in its broadest sense* to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law. [*Id.* at 29933]

And Senator Javits added:

Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs. . . . If it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modification can be made. [*Id.* at 29942]

A fair summary of the congressional understanding of § 514 was provided in a report issued by the House Subcommittee on Labor Standards, chaired by Rep. Dent,

pursuant to a mandate contained in ERISA § 3022(a), during the congressional session immediately after ERISA was enacted.[14] That report states:

ERISA, among its many provisions, provides for a significant adjustment in the regulatory roles of state and federal authority with respect to the various elements of the employee benefit plan field. The provisions of section 514 expressly reserve to Federal authority the regulation of employee benefit plans subject to the jurisdiction of the Act. In electing deliberately to preclude state authority over these plans, Congress acted to insure uniformity of regulation with respect to their activities. There was a recognition of the necessity for the preservation of some state activity in this field and *certain limited exceptions were made to the broad preemption scheme. In general these exemptions are designed to save state law as it is applid to entities which are not employee benefit plans* as defined in section 4(a) and not exempt under section 4(b), *to the extent that such regulation does not relate to employee benefit plans.*

From the early 1970's the legislative activities which eventually produced ERISA involved various framings of preemption schemes. The Committee's hearing record prior to 1974 contains numerous discussions of the propriety of one approach or another.

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[14] ERISA § 3022(a) required a "full study and review," during the Congress following enactment of the law, of several subjects including "(4) the effects and desirability of the Federal preemption of State and local law with respect to matters relating to pension and similar plans." The study was to have been conducted by the "Joint Pension Task Force" which was to be composed of the staffs of the various committees that had been responsible for the enactment of ERISA. *See* ERISA §§ 3021, 3022. The Joint Task Force was never constituted, however, and Rep. Dent's committee, acting pursuant to Rule X of the Rules of the House of Representatives for the Ninety-Fourth Congress, created its own Task Force on Welfare and Pension Plans. That Task Force conducted lengthy oversight hearings (some in conjunction with the House Ways and Means Committee) and issued the report quoted in text. *See* H.R. Rep. 94-1785, 94th Cong., 2d Sess. 38 (1977).

Once it had become clear that our policy would be the creation of uniform national standards, the problem was to extract these plans from the regulatory schemes in the several states without creating untoward side effects.

A number of states had undertaken to regulate employee benefit plans as such; others had already made, or appeared ready to declare, these plans subject to state control as insurers, trust companies, or investment companies. From a drafting standpoint the difficulty arose in attempting to extricate these plans from the framework of state insurance, trust and securities regulation even though their activities might very well bring them within the sphere of conduct historically subject to such regulation. On the one hand it was clear that the plans subject to ERISA needed to be freed of the possibility of state regulation; on the other hand, it was important to limit the effects of preemption, *in order to avoid disrupting state efforts to regulate the conduct of other financial entities not subject to the federal Act.*

* * *

Based on our examination of the effects of section 514, it is our judgment that the legislative scheme of ERISA is sufficiently broad to leave no room for effective state regulation within the field preempted. Similarly it is our belief that the Federal interest and the need for national uniformity are so great that enforcement of state regulation should be precluded.

* * *

We remain convinced of the propriety and necessity for the very broad preemption policy contained in section 514. To the extent that the scheme of regulation is found to be deficient with respect to some or all of the plans covered by the Act, we are prepared to consider amendments expanding or modifying the federal standards. We will be most reluctant to consider any remedy involving a limitation on the preemptive scheme as it applies to the plans

described in section 3(3) of Title I. [H.R. Rep. 94-1785, 94th Cong. 2d Sess. 46-47, 48 (1977)]

2. The legislative history just reviewed is instructive in four regards.

First, that history shows that contrary to the Massachusetts court's conclusion, *see* p. 7 *supra*, Congress clearly was intent on protecting "private decision-making" in the structuring of employee benefit plans. The Senate and House committee reports on the bills that became ERISA both state, as a formative principle underlying the Act, an intent to accommodate "the interests of employers and labor organizations in maintaining flexibility in the design and operation of their pension programs." P. 16 *supra*; *see also* p. 14 *supra* (Secretary Schultz's testimony). Moreover, a principal reason the scope of § 514(a) was broadened by the conference committee was precisely to preclude state regulation of "the form and content of a legal service plan," p. 19 *supra* (Sen. Javits), and thus to assure "employers and unions the freedom to develop and operate legal service plans of their choice," p. 19 *supra* (Sen. Williams).

Second, the legislative history likewise belies the Massachusetts court's attempt to minimize Congress' desire to allow "interstate employers to maintain uniform plans." *See* p. 7 *supra*. Beginning with the very first preemption proposal in 1970, the advocates of preemption consistently stated this as their principal rationale, *e.g.*, p. 15 *supra* (Secretary Schultz); the 1973 Senate and House committee reports therefore state that, "[b]ecause of the interstate character of employee benefit plans, the Committee believes it is essential to provide a uniform source of law . . ." p. 17, *supra*; and the 1977 House report reemphasizes that "the Federal interest and the need for uniformity are so great that enforcement of state regulation should be precluded," p. 22 *supra*.

Third, the legislative history—especially the explanatory statements following the conference report—estab-

lish that "Congress applied the principle of pre-emption 'in its broadest sense to foreclose any non-Federal regulation of employee benefit plans,'" and not just non-Federal regulation that conflicts with ERISA's rules. *Shaw v. Delta Air Lines*, *supra*, 51 L.W. at 4972. Those statements show with equal clarity that Congress viewed the savings clause as "creating only very limited exceptions to pre-emption." *Id. See also* p. 20 *supra* (Rep. Dent, Sen. Williams).

Fourth and finally, the legislative history contains not one iota of evidence to suggest that Congress intended to create a regime which would discourage or effectively preclude the use of insurance to fund employee benefits. To the contrary, the legislative history shows that the "most important purpose" of the Act is "to assure American workers that they may look forward with anticipation to a retirement with financial security and dignity," and that to do so the Act specifically seeks to assure "adequate funding" of pensions lest "a promise of pension" prove "illusory and empty." S. Rep. 93-127, *supra*, at 11, 10; H.R. Rep. 93-533, *supra*, at 8, 7. Congress recognized that one means of funding employee benefits is through the "purchase of insurance," ERISA § 3(1), 29 U.S.C. § 6 1002(1) (defining "employee welfare benefit plan"), and insured plans were viewed as safer than self-insured plans; the resulting preference for insurance is manifest in the very structure of the Act.[15] Thus, by attributing to Congress an intent to discourage the creation or maintenance of insured plans, the decision below flies in the face of Congress' intent.

[15] For example, ERISA § 302, 29 U.S.C. § 1082, establishes a complex set of minimum funding standards for pension plans, but under § 301(a)(2), 29 U.S.C. § 1081(a)(2), this set of standards is generally inapplicable to plans funded exclusively by insurance. Congress created this exemption because of the fact that insured plans "have behind them the funding of the insurance companies," H.R. Rep. 93-779, 93rd Cong. 2d Sess. 24 (1974) (House Ways and Means Committee); 2 *Leg. Hist.* 3316 (House Committee on Education and Labor explanatory material), and thus Congress concluded that such plans "will be properly funded," 2 *id.* 3342. For other examples of favored treatment of insured plans, *see, e.g.*, ERISA § 103(a)(C), 29 U.S.C. § 1023(a)(C), 29 U.S.C. § 1023 (a)(C) (exempting insured plans from certain auditing requirements); § 406(b)(1), 29 U.S.C. § 1103(a) (insurance contracts, unlike all other assets of a benefit plan, need not be held in trust).

It is noteworthy in this regard that ERISA distinguishes between true insurance and plans in which an insurance company maintains a "separate account" for the premiums paid by the employer which account provides the sole source of money to fund benefits for the employer's employees. *See* ERISA § 3(17), 29 U.S.C. § 1002(17). Generally speaking, separate account plans—which are, in substance, a species of self-insurance—do not qualify for the favored treatment afforded to insured plans.

3. Given all this, there can be no doubt that, as the Massachusetts court itself recognized, *see* pp. 6-7 *supra*, the phrase "a law . . . which regulates insurance" cannot, in the context of the savings clause, refer to all laws which, in form, are addressed to insurers. As previously noted, such an interpretation would leave the states free to impose rules on insured benefit plans even with respect to those matters that Congress itself regulated, such as vesting requirements. *See* p. 7 *supra*. The legislative history establishes that, as early as 1970, the decision was made to establish uniform federal rules at least with respect to those subjects being regulated by ERISA; as the 1973 Senate committee report stated: "[i]t is not intended . . . that the state agencies . . . would formulate or apply substantive standards to plans subject to this Act which differ from the standards in this Act." Pp. 17-18 *supra*. Thus, the phrase "law . . . which regulates insurance"—which phrase appeared in every major pre-ERISA bill from 1970 forward—must refer to a class smaller than that consisting of all laws addressed to insurers.

Equally clearly—and contrary to the decision below—the savings clause cannot be read to permit all indirect state regulation of insured benefit plans that does not con-

flict with an express provision of ERISA. That interpretation is inconsistent with the congressional policies favoring private autonomy in establishing benefit plans, naitonal uniformity in regulating such plans, and the preference for insurance to fund such plans. Congress cannot be understood, in enacting what it saw as a "very limited" exception to the "broad[]" preemption rule of § 514(a), p. 24 *supra*, to have effectively nullified those critical policies with respect to insured plans by authorizing state regulation of the fundamental elements of such plans so long as the state law is in the form of insurance regulation.[16]

The conclusion is thus inescapable that a "law . . . which regulates insurance" within the meaning of the savings clause is a law that both in form *and in substance* is addressed to the decisions or actions of insurers. That is the meaning stated in the section-by-section analysis of the Nixon administration bill in which a preemption provision and the saving clauses were first developed and cojoined:

> Section 18 designates the Act as the exclusive form of regulation for employee benefit plans within the areas covered, but provides that State laws which otherwise regulate insurance . . . remain operative. [P. 13 *supra*]

[16] In this regard, *Alessi* v. *Raybestos-Manhattan, Inc., supra*, is instructive. At issue in that case was a state workers compensation statute under which workers compensation benefits could not be used to offset pension benefits. In holding that law preempted by § 514(a) the Court stated:

> It is of no moment that New Jersey intrudes indirectly, through a workers compensation law, rather than directly, through a statute called "pension regulation." ERISA makes clear that even indirect state action bearing on private pension plans may encroach upon the area of exclusive federal concern. . . . *ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the preemption provision.* [451 U.S. at 525; emphasis added]

That is likewise the meaning stated by the House report issued in the Congress after ERISA was enacted which says that the purpose of the "limited exceptions" was "to avoid disrupting state efforts to regulate the conduct of other financial entities not subject to the federal Act." P. 22 *supra*. And that is the only interpretation, we submit, that makes sense of the statutory language and that accords with Congress' intent. Accordingly, because the Massachusetts law at issue here concerns the types of benefits to be provided by benefit plans —a fundamental decision for private parties to make in creating such plans—the statute is not a "law . . . which regulates insurance" within the meaning of the savings clause and hence is preempted by ERISA § 514(a).

CONCLUSION

For the foregoing reasons, the judgment of the Massachusetts Supreme Court Judicial should be reversed.

Respectfully submitted,

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